

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	No. 63880-7-1
)	
Appellant,)	
)	
v.)	UNPUBLISHED OPINON
)	
)	
JESSE WILLINGHAM,)	
)	
Respondent.)	
<hr style="width: 45%; margin-left: 0;"/>)	FILED: <u>November 2, 2009</u>
)	

Schindler, C.J. — The State must file a charge of indecent liberties within the three-year statute of limitations. However, the statute of limitations is tolled for “any time when the person charged is not usually and publicly resident within this state.” RCW 9A.04.080(2). The State appeals an order dismissing the criminal charge of indecent liberties against Jesse Willingham as barred by the statute of limitations. The State contends the trial court erred in concluding that the statute of limitations was not tolled for the two-week period Willingham spent in Utah. Because legal residence is irrelevant for purposes of the tolling provision and under the plain language of RCW 9A.04.080(2), “mere absence” tolls the three-year statute of limitations for indecent liberties, we reverse.

In an interview with a Jefferson County Sherriff’s Officer, Jesse

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Willingham admitted having sexual contact with his foster child A.R. On August 14, 2008, the State filed an information charging Willingham with two counts of indecent liberties in violation of RCW 9A.44.100(1)(c). The State alleged that Willingham sexually assaulted his developmentally delayed foster daughter A.R. on or about July 1, 2005, Count I, and on or about August 1, 2005, Count II.

Willingham filed a motion to dismiss, arguing that the three-year statute of limitations under RCW 9A.04.080(1)(h) barred prosecution. The State filed a motion to amend the information to only charge Willingham with the one count of indecent liberties alleged to have occurred on August 1, 2005. The State conceded that the information was filed more than three years after the alleged crime occurred, but asserted that the statute of limitations was tolled when Willingham was in Utah from June 2 to June 16, 2008. The State presented documentation establishing that Willingham was in Utah in June 2008 for at least two weeks.

Willingham did not dispute that he was in Utah for the two weeks in June. But Willingham argued that the tolling provision under RCW 9A.04.080(2) does not apply to a temporary absence from the State. The court ruled that the statute of limitations was not tolled during Willingham's absence and dismissed the criminal charge of indecent liberties with prejudice. The State appeals.

DECISION

RCW 9A.04.080(1)(h) requires the State to file charges of indecent liberties within three years. But under RCW 9A.04.080(2), “[t]he periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.”

The State relies on State v. Ansell, 36 Wn. App. 492, 675 P.2d 614 (1984), to argue that Willingham’s two-week absence tolled the three-year statute of limitations under RCW 9A.04.080(2). Willingham asserts that because he continued to reside in Washington and “use his Washington address” when he was in Utah, his two-week absence did not toll the statute of limitations.

The meaning of a statute is a question of law that we review de novo. Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). When interpreting a statute, the court’s primary objective is to ascertain and give effect to the intent and purpose of the legislature. American Continental Ins. Co., v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). In determining legislative intent, we first look to the plain language and ordinary meaning of the statute. Nat’l Elec. Contractors Ass’n, Cascade Chapter v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). If the meaning of the statute is plain and unambiguous, our inquiry is at an end. Berrocal v. Fernandez, 155 Wn.2d 585, 599, 121 P.3d 82 (2005).

In Ansell, this court interpreted the meaning of the language of RCW 9A.04.080(2). Citing the leading case of People v. Carman, 52 N.E.2d 197 (Ill.

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1943), the Ansell court concluded that the language of RCW 9A.04.080(2) unambiguously tolls the statute of limitations while a defendant is absent from the State. Ansell, 36 Wn. App. at 496. In interpreting the language “usually and publicly resident,” the Carman court held that the language was “too clear to admit of construction” and to construe the statute to mean legal residence “would do violence to all recognized rules of construction.” Carman, 52 N.E.2d at 199. Following the majority of courts, the Ansell court held that the defendant’s “mere absence from Washington was enough to toll the statute.” Ansell, 36 Wn. App. at 496. “Most courts which have considered this issue have held ‘not usually and publically [sic] resident’ to simply mean ‘absent,’ without regard to whether a defendant was concealing himself or fleeing from justice.” Ansell, 316 Wn. App. at 494. The Ansell court also cited to the determination of other courts that “mere absence, regardless of intent to evade justice, is enough to toll a statute of limitations similar to Washington’s.” Ansell, 36 Wn. App. at 495. The court noted that the interpretation of the statute was based solely on a defendant’s absence from the State whether it was voluntary or involuntary. Ansell, 36 Wn. App. at 495.

Our courts have adhered to the reasoning of Ansell in subsequent cases. See State v. Newcomer, 48 Wn. App. 83, 91-92, 737 P.2d 1285 (1987) (statute of limitations tolled while defendant was incarcerated outside of Washington); State v. McDonald, 100 Wn. App. 828, 832-33, 1 P.3d 1176 (2000) (statute of limitations tolled while defendant living in New York); State v. Israel, 113 Wn.

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App. 243, 293-94, 54 P.3d 1218 (2002) (statute of limitations tolled despite ongoing contacts with Washington).¹ Moreover, the “usually and publicly resident” language contained in RCW 9A.04.080(2) has been in effect without amendment for more than thirty years. See State v. Edwards, 84 Wn. App. 5, 12-13, 924 P.2d 397 (1996) (legislature's failure to amend the law in response to a court's interpretation implies agreement with that interpretation); Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 327 n. 3, 971 P.2d 500 (1999) (the legislature is presumed to be aware of judicial interpretations of legislation and the failure to amend a statute following a judicial decision interpreting a statute indicates legislative acquiescence in that decision).

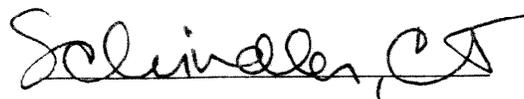
Willingham's reliance on federal tax cases to argue that a temporary absence from the State does not toll the statute of limitations is unpersuasive. The federal tax cases Willingham cites, United States v. Gross, 159 F.Supp. 316, 321-22 (D. Nev. 1958); United States v. Beard, 118 F.Supp. 297 (D. Md. 1954); and United States v. Mathis, 28 F.Supp. 582, 584-85 (D. N.J. 1939), involve interpretation of an 1884 tolling provision of the Internal Revenue Code that was in effect until 1954. See former 26 U.S.C. § 3748(a). Under former 26 U.S.C. § 3748(a) the statute of limitations was tolled during periods of time when the defendant was “absent from the district” where the crime was committed. Under the current code, the limitations period for violation of tax laws is tolled

¹ We also note that Ansell has been cited with approval and followed by courts in other jurisdictions. See, e.g., State v. Whitman, 466 N.W.2d 193 (Wis. 1991); State v. Stillings, 778 P.2d 406 (Mont. 1989)

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when a defendant is “outside the United States” or is a fugitive from justice. See 26 U.S.C. § 6531. The federal courts interpret the current tolling provision consistently with our interpretation of the tolling provision contained in RCW 9A.04.080(2) to mean that the tolling provision applies whenever the defendant is outside of the physical boundaries of the United States. See, United States v. Yip, 248 F. Supp. 2d 970, 974 (D. Hawai’i 2003).

We adhere to our decision in Ansell and hold that Willingham’s two-week absence from Washington tolled the three-year statute of limitations for the crime of indecent liberties that occurred on or about August 1, 2005. Accordingly, we reverse dismissal of that charge.



WE CONCUR:



